FILED
JUN 6 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. [redacted] 123

BERNARD H. DANIEL,
Petitioner and Appellant Below,

v.

UNITED STATES OF AMERICA,
Respondent and Appellee Below.

PETITION FOR [illegible]

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IN THE

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OCTOBER TERM, 1941

No.

BERNARD H. DANIEL,
Petitioner and Appellant Below,

Vs.

UNITED STATES OF AMERICA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE HARLAN FISKE STONE, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your Petitioner respectfully shows:

I.

Summary Statement of the matters involved:

November 23rd, 1939, in the day-time, Petitioner was driving his automobile containing 15 cases of whiskey, *south* on U. S. Highway 71 by-pass, about 4 miles south of Lee's Summit, Missouri, when he was arrested by a state highway patrolman and turned over to agents of the Federal Alcohol Tax Unit who procured this petitioner's indictment under the *Liquor Enforcement Act of 1936, 27 U. S. C. A., Section 223,* on a charge of attempting to transport intoxicating liquors into Kansas, a "dry" state, without permit so to do. Petitioner was tried by the district court on his written stipulation waiving trial by jury, and was found guilty, and appealed to the Eighth Circuit in its case No. 11,846.

The Government there confessed error for reasons not here material and Petitioner was re-tried in the district court. By stipulation, the Government was permitted to prove its case by offering the narrated testimony of its witnesses at the first trial, as recited in the Bill of Exceptions in case No. 11,846. The Petitioner offered no testimony in his own behalf, moved for a directed verdict which was refused, and was again found guilty, and again appealed to the Eighth Circuit, where his conviction was affirmed, *Daniel* v. *United States,* 127 F. (2d) 1, in case No. 12,120. By order of the Eighth Circuit the transcript in the first appeal was made part of the Record on the second appeal, and so the transcripts in both cases are here filed. References to the transcript refer to case No. 11,846 which contains the testimony, unless otherwise noted.

The Government proved that Petitioner purchased the liquor in East St. Louis, Illinois; that he lived at Emporia, Kansas, and had lived there with his family for some time; that he told the arresting officers he was on his way to Houston, Texas, with the liquor. The Government also proved by its witnesses that shortly before his arrest Mr. Daniel had actually gone to Houston, Texas, where he had procured license plates for his car (which were on it when he was arrested), Texas driver's license, and had bought a Federal liquor stamp designating him as a liquor dealer at Houston, Texas, and that he had announced his intention of removing to Houston to enter the liquor business there, shortly before his arrest. The Government also showed he had Kansas driver's license, and Kansas license plates were inside his car.

U. S. Highway 50 runs southwesterly from East St. Louis, Illinois, to Emporia, Kansas; Petitioner was arrested when traveling south on Highway 71 by-pass, about 4 miles south of its intersection with Highway 50; the by-pass leads south into Highway 71 and thence to Houston, and Mr. Daniel was actually driving in that direction when arrested.

The Government's proof of intent was purely circumstantial and it offered, over Petitioner's objections, testimony of statements alleged to have been made by Petitioner when arrested to the effect that about two weeks before the date of his arrest he had taken another load of whiskey to Texas and that he and his sister-in-law had consumed it there. The Government then produced Petitioner's sister-in-law who testified that he had not brought any liquor to her home in Houston. The trial court held that the evidence complained of was both competent and prejudicial. The Eighth Circuit held that the

reception of incompetent evidence would not be prejudicial in a trial by the court and failed to pass on the competency of the evidence complained of, although the Eighth Circuit's opinion leans heavily on inferences unfavorable to the defendant based on the incompetent evidence.

Petitioner contends:

(a)

That the Court erred in admitting, over his objections, any evidence of his statements regarding the previous load of whiskey, such evidence being both incompetent and prejudicial.

(b)

Since all of the competent evidence in the Record is as consistent with the hypothesis of innocence as with guilt, it was the duty of the trial court to sustain his motion for acquittal.

(c)

His motion for acquittal should have been sustained because the Government failed to prove that the whiskey being transported by him was not accompanied by a permit.

(d)

His conviction is based on inference built on inference and presumption built on presumption, and is not supported, as a matter of law, by any evidence.

(e)

By reason of the foregoing his conviction is not supported by any competent evidence.

II.

STATEMENT OF BASIS OF JURISDICTION

The jurisdiction of this Court is invoked under *Section 240 of the Judicial Code* as amended by Act of Congress February 13th, 1925, Ch. 229, 43 Stat. 938 (28 U. S. C. A. 347).

The judgment of affirmation sought to be reviewed was rendered on April 15th, 1942, and the motion for rehearing was denied May 7th, 1942 (R. case No. 12,120, pp. 22-27); this petition is filed within thirty days from May 7th, 1942.

The following cases, it is believed, sustain the jurisdiction of this Court to issue its Writ of Certiorari:

United States v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129, where it is held that where a defendant's motion for directed verdict at the conclusion of the case was denied by the district court, which action was affirmed by the Circuit Court of Appeals, and where the defendant argued before the Supreme Court that there was no substantial evidence to sustain the conviction, a question of law was raised entailing an examination of the Record not for the purpose of weighing the evidence, but only to ascertain whether there was competent and substantial evidence fairly tending to sustain the verdict.

Lilienthal's Tobacco v. *United States,*
97 U. S. 237; 24 L. Ed. 901.
Potter v. *United States,*
155 U. S. 438, 15 S. Ct. 144, 39 L. Ed. 214.
Davis v. *United States,*
160 U. S. 469, 16 S. Ct. 353, 40 L. Ed. 499.

III.

QUESTIONS PRESENTED

I.

Is a defendant to be denied a ruling on the competence of evidence, which the trial court held was prejudicial, merely because he has waived a trial by jury? Here the trial court held the evidence complained of to be prejudicial to the defendant (R. 24, 27). The Eighth Circuit failed to rule our complaint as to its competency and so denied us the full and equal protection of the law.

II.

Is not the substantial evidence in this record as consistent, as a matter of law, with the hypothesis of innocence as with that of guilt?

III.

Does all of the substantial competent evidence in this Record sustain the conviction?

IV.

Does the substantial competent evidence in this Record sustain a conviction without building inference on inference and presumption on presumption?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

We sincerely believe this case presents special and important reasons touching judicial discretion for the granting of the writ:

I.

The law affords equal protection to all, and it should be the policy of the law to encourage the waiver of jury trials in the interest of expediency and economy. The Eighth Circuit, by refusing to rule the competency of the evidence complained of, denied us the full and equal protection of the law for it could not have evaded such a ruling if the case had been tried to a jury, and so, by its failure to rule the competency of the evidence, penalized the defendant. If its action is to be upheld, then no defendant can safely waive a trial by jury. This presents an important question of Federal law which we believe has not, but should be, settled by this Court.

II.

The opinion of the Eighth Circuit conflicts with that of the Ninth Circuit in *Oras et al* v. *United States,* 67 Fed.

(2d) 463, where that Court rejected incompetent evidence in determining that there was not sufficient substantial evidence without it, to sustain the conviction under review by it.

III.

On this Record, all of the substantial evidence is as consistent with innocence as with guilt, and it was the duty of the Eighth Circuit to reverse the judgment of conviction, and its failure so to do conflicts with the rulings of the Sixth Circuit in *Harrison* v. *United States,* 200 Fed. Rep. 662.

IV.

In this Record, there is no substantial evidence at all which supports the conviction, and it was the duty of the Eighth Circuit to reverse the judgment, but it failed so to do, and its ruling is in conflict with the rulings of this Court in

Wiborg v. *United States,*
163 U. S. 632, 16 S. Ct. 1127, 41 L. Ed. 289;
Clyatt v. *United States,*
197 U. S. 205, 25 S. Ct. 429, 49 L. Ed. 726;
Edenfield v. *United States,*
(Fifth Circuit) 112 F. (2d) 931.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this Court for its review and determination

on a day certain therein named a full and complete transcript of the Record and proceedings in the case of *Bernard H. Daniel, Appellant,* v. *United States of America, Appellee, No. 12,120,* to the end that this cause may be reviewed and determined by this Court as provided for in the Statutes of the United States, and that said decree and judgment of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court and that of the District Court reversed, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

SAM MANDELL,

Attorney for Petitioner.